
2016 Hawai'i Department of Transportation Civil Rights Symposium

Disparity Studies

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Disparity Studies: Why They Matter

- Provide litigation defense
 - Programs without solid studies will be struck down
 - Studies aren't challenged; programs are challenged
- Meet regulatory requirements of 49 C.F.R. Part 26
 - Set overall, annual DBE goals
 - Develop DBE contract goals
- Make administrative improvements
 - Obtain confidential customer feedback
 - Create focus on data collection & monitoring
 - Supportive administrative accountability

Legal Standards

- Strict scrutiny standards
 - Race-conscious government decision-making must meet two prongs
 - There must be a “strong basis in evidence” of the agency’s “compelling interest” in remedying discrimination
 - Remedies must be “narrowly tailored” to that evidence
 - Purpose of strict scrutiny
 - Expose “illegitimate notions of racial inferiority or simple racial politics”
 - Provide a “framework for carefully examining the importance and the sincerity of the reasons” for using race

Legal Standards, cont.

- “Societal” discrimination is not sufficient
- Determine which racial & ethnic groups suffer in the local marketplace
- Disparities between population & agency utilization of DBEs is insufficient
- Race-neutral measures must be seriously considered
- Evidentiary standard can be met through defensible disparity studies
- Gender is subject to “intermediate scrutiny”
- Location, size, veteran status, etc. subject to “rational basis” scrutiny

Disparity Studies Gone Bad: Agency A

- Weak legal analysis
- No economy-wide evidence of discrimination
- Weak anecdotal evidence; experiences of non-M/W/DBEs not explored
- No analysis of contracts over \$500K
- Overly broad industry categories (*i.e.*, no NAICS codes)
- Incorrect market area definition

Disparity Studies Gone Bad: Agency A , cont.

- No info on prime contractor survey, response rates or non-response testing
- Majority of construction contracts & dollars not included
- Incomplete availability measures
- Unnecessary & confused “willingness” test for primes
- Unnecessary & indefensible “capacity” analysis
- **Result: weak program with low goals**

Disparity Studies Gone Bad: Agency B

- Improper availability analysis
 - Excluded minority & women firms that “might” not be eligible to be certified as DBEs
 - Excluded firms that had not bid
 - Excluded discouraged firms
 - Excluded firms that did not participate in the survey, even if they were working for the agency
 - No non-response testing for survey
 - Original D & B universe of 50,000 firms reduced to 3,400

Disparity Studies Gone Bad: Agency B, cont.

- No Census SBO or ACS analysis
- Unnecessary & indefensible “capacity” analysis
- **Result: some minority groups were dropped from the race-conscious program & a low overall goal was adopted**

Recommended Disparity Study Elements

- Determine utilization of DBEs as % of total dollars in the agency' s geographic & product marketplaces
 - Use highest level of detail (6-digit NAICS codes not "construction")
 - Do not set a ceiling (e.g., \$500K); do set a floor (e.g., informal procurement method threshold)
 - Fill in missing non-DBE subcontractor data
 - Obtain large majority of contracts & contract dollars (e.g., 85%)

Recommended Disparity Study Elements, cont.

- Determine DBE availability using the real “Custom Census” approach
 - Create database of relevant agency projects
 - Identify the geographic & product markets empirically
 - Count **all** businesses in relevant markets
 - Identify & verify all DBEs in those markets
 - Do not determine availability by surveys
 - Do not adjust for “capacity”

Recommended Disparity Study Elements, cont.

- “Custom Census” benefits
 - Provides dollar-weighted availability estimates to set overall, annual DBE goals
 - Provides detailed availability estimates to set DBE contract goals
 - Casts a “broad net” as held by courts to meet the DBE program’s remedial purpose
 - Counts all businesses in relevant markets, not just those either known to the agency or responding to surveys

Recommended Disparity Study Elements, cont.

- Do not use the “Bidders List” Approach
 - Existing discrimination may lead to under-representation
 - Popularity of program may lead to over-representation
 - “Apples to oranges” if lists are combined
 - Separate prime & sub calculations are unrealistic, too simplistic & maintain barriers
 - **Remedial aspect of the Program is lost by looking only at current results without regard to the current effects of past & present discrimination**

Recommended Disparity Study Elements, cont.

- Do not conduct a “capacity” analysis
 - No common definition
 - Ignores the elasticity of supply, especially in construction
 - What about subcontracts?
 - Disparities persist even when variables are controlled for
 - Variables (revenues, years in business, bonding limits, etc.) are impacted by discrimination
 - **Ignores the DBE program’s remedial nature by locking in the results of past discrimination**
 - “Capacity” argument rejected by courts when explained by expert testimony

Recommended Disparity Study Elements, cont.

- Conduct an agency contracts disparity analysis
 - Necessary but not sufficient for current programs because of the effect of remedial market intervention
 - A finding of no disparity isn't the end of the analysis; consider
 - Effects of the existing program
 - Continuing impact of discrimination

Recommended Disparity Study Elements, cont.

- Conduct an economy-wide disparity analysis
 - Look outside agency's own contracting activities
 - Critical element of legal defense for existing programs
 - Elements
 - DBEs' vs. non-DBEs' utilization throughout the economy from the Census Bureau's Survey of Business Owners
 - DBEs' vs. non-DBEs' business formation rates & earnings from Census Bureau's American Community Survey
 - Review literature on credit market discrimination

Recommended Disparity Study Elements, cont.

- Include anecdotal evidence
 - Necessary but not sufficient
 - Explore current effects of past biases & exclusion
 - Examine denials of full & fair access to government contracts & subcontracts
 - Evaluate existing programs for effectiveness in remedying discrimination & providing opportunities
 - **Critical element for DBEs' participation**

Recommended Disparity Study Elements, cont.

- Conduct a program review
 - Interview DBEs, primes & staff
 - Evaluate the effectiveness of contract goals
 - Evaluate the effectiveness of race-neutral measures
 - Utilization on no-goals contracts
 - Small business elements
 - Size standards & personal net worth criteria
 - Set-asides
 - Contract goals
 - Supportive services efforts
 - Business Development Program

Recommended Disparity Study RFP Design & Process

- Allow at least one year for study completion
- Evaluate cost factors
- Include legal counsel at all steps
- Use a general rather than a detailed scope of work
- Require a sample study
- Check references
- Conduct face-to-face interviews
- Don't add extraneous issues like employment

Recommended Disparity Study RFP Design & Process, cont.

- Study scope
 - Use 5 years of contract data, if possible
- Types of contracts
 - USDOT-funded?
 - Locally-funded?
 - Informal?
 - Sole source?
 - Concessions?

Recent Errors

- Minor
 - Excessive in person meetings
 - Inflexible interview dates
- Major
 - Relying on price
 - Including small businesses, veterans, corporate boards, other unrelated availability & disparity analyses
 - Requiring free expert witness support
 - Hiring anti-affirmative action consultants as experts

Challenges of Study Updates

- What contract data have been collected?
 - Is there a comprehensive contract data collection & monitoring system?
 - If not, then an update is not possible
 - If so, then provide to the consultant:
 - Detailed race & gender info for prime contractors & subcontractors by 6-digit NAICS code
 - Data on “no goals” contracts”
 - Detail on outreach efforts
 - Data on the number of waiver or goal reduction requests

Challenges of Study Updates, cont.

- What data on race-neutral measures have been collected?
 - What race-neutral programs are implemented
 - Bonding
 - Financing
 - Technical assistance, including how to do business with the agency
 - Supportive services grant-funded efforts
 - Race & sex data & NAICS codes for firms that participate in each program

Conclusion

Methodology Matters: Do Your Homework

- Does the agency want a strong remedial program?
- What methodology does the consultant apply? Do the results of prior studies comport with reality & remedial objectives?
 - No disparities found for Blacks in a deep South community
 - Only contracts under \$1M were studied so no goals were adopted for contracts over \$1M for city with a \$50B budget

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